

Message Text

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C O R R E C T E D C O P Y (CLEARANCES AND TEXT)

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E.O. 11652: GDS

TAGS: NATO, PFOR, PARM, ICRC

SUBJECT: NATO CONSIDERATION OF DRAFT PROTOCOL
ON INTERNATIONAL HUMANITARIAN LAW
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APPLICABLE IN ARMED CONFLICTS

REF: (A) USNATO 7019 (B) USNATO 7013
(C) STATE 308066 (D) USNATO 6893 (NOTAL)

1) SUMMARY. THI TELEGRAM RESPONDS TO REFS A AND B.
IN VIEW OF BACKGROUND AND REASONING SET FORTH BELOW, WE
CONCLUDE IT BEST TO CONSULT WITH MEMBERS OF "INNER CORE"
AND THEN PROCEED WITH DISCUSSIONS IN POLADS, PROVIDED
THERE IS NO SERIOUS OBJECTION FROM INNER CORE MEMBERS.

WE CONTINUE TO BELIEVE THAT US DEL SHOULD SEEK AGREEMENT TO DEFER MC STUDY UNTIL CONCLUSION OF DIPLOMATIC CONFERENCE, AS STATED IN PARA 11 BELOW. END SUMMARY.

2) WORK ON DRAFT PROTOCOLS ON INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS IS NEITHER NEW NOR SECRET FROM US ALLIES. WORK BEGAN SERIOUSLY IN EXPERTS CONTEXT IN 1971, AND DIPLOMATIC CONFERENCE HAS BEEN HOLDING SESSIONS SINCE 1974. SINCE BEGINNING OF WORK IN 1971, WE HAVE HAD FREQUENT MEETINGS AT EACH EXPERTS OR DIPLOMATIC CONFERENCE WITH FOREIGN MINISTRY

AND DEFENSE MINISTRY PERSONNEL OF ALLIES AND HAVE COORDINATED POSITIONS IN GREAT DETAIL WITH REGARD TO EVERY ISSUE BEFORE EACH SESSION OF CONFERENCE. ALTHOUGH A SPECIAL CONFERENCE AT NATO WAS CONVENED IN 1972 TO DISCUSS THE ICRC DRAFT PROTOCOLS, SUBSEQUENT COORDINATION HAS USUALLY BEEN DONE IN UN-TYPE CAUCUS GROUPS IN THE CONFERENCE FORUM. THUS, WE HAVE HAD FREQUENT MEETINGS OF WESTERN EUROPEAN AND OTHERS (WEO) GROUP. IN ADDITION, THERE HAVE BEEN NUMEROUS AND CONTINUING BILATERAL AND MULTILATERAL MEETINGS TO COORDINATE POSITIONS AMONG ALLIES. MEETINGS HAVE NOT ONLY BEEN AT EXPERT LEVEL, BUT AT LEVEL OF HEADS OF DELEGATION. IN ADDITION TO THIS, SINCE BEGINNING OF DIPLOMATIC CONFERENCE, WE HAVE ALSO HELD INTERSESSIONAL CONFIDENTIAL

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WEO GROUP MEETINGS EACH YEAR IN LONDON TO COORDINATE POSITIONS. IN ADDITION TO WEO GROUP, WE ESTABLISHED A SMALLER "INNER CORE" OF WEO GROUP, I.E. U.S., U.K., FRANCE, CANADA, AND FRG, WHICH NORMALLY MEETS AT HEAD OF DELEGATION LEVEL, AND WHICH HAS AS BASIC AIM PRECOORDINATION OF ISSUES IN WEO GROUP BUT ALSO ADDRESSES OTHER ASPECTS OF CONCERN. THIS CONSULTATIVE MECHANISM HAS WORKED WELL OVER THE PAST YEARS WHILE WE HAVE BEEN DEALING WITH THE SUBJECT.

3) AS WE INDICATED IN REF C, U.S. RECOGNIZES FRG CONCERN, PARTICULARLY AS RELATED TO PROBLEM WITH FRG DOMESTIC LAW. WE ARE DOING UTMOST TO ACCOMMODATE CONCERN. WE BELIEVE THAT CONSULTATIVE MECHANISM TO COPE WITH FRG PROBLEM HAS MOVED RATIONALLY IN PAST HALF YEAR. AS INDICATED, FIRST WE DISCUSSED FRG CONCERN BILATERALLY. NEXT, WE REVIEWED THOSE CONCERNS IN THE "INNER CORE" GROUP, WITH AN EFFORT TO DETERMINING A UNIFIED APPROACH FOR DEALING WITH PROBLEM. DURING BONN MEETING WE DISCUSSED BOTH SUBSTANCE OF FRG PROBLEMS AND STRATEGY FOR FURTHER CONSULTATION ON PROBLEMS AND FOR PRESENTING PROBLEM TO NATO. AS INDICATED IN REF C, WE THOUGHT WE HAD AGREED ON AN APPROACH FOR BRINGING THE PROBLEM TO NATO. FRG SCENARIO DESCRIBED IN PARA 1 OF

REF B DOES NOT COINCIDE WITH OUR UNDERSTANDING OF CON-
CENSUS AT BONN MEETING AND WE CONTINUE TO QUESTION
WHETHER THIS REPRESENTS A COORDINATED FRG POSITION.

4)FYI. IN ASSESSING PROBLEM, IT IS IMPORTANT TO UNDER-
STAND THAT ALLIES WITHIN AND OUTSIDE NATO HAVE BASICALLY
BEEN IN ACCORD WITH U.S. INTERPRETATIONS OF PROVISIONS
IN PROTOCOLS. FRG LEGAL POSITIONS AS SET FORTH IN BONN
HAVE NOT FOUND SUPPORT IN "INNER CORE" (EXCEPT FOR
FRANCE) AND WE DOUBT THEY WOULD BE SUPPORTED IN WEO
GROUP. THERE IS A REAL CONCERN THAT CERTAIN FRG

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OFFICIALS MAY BE TRYING TO DERAIL DRAFT PROTOCOL BY
USING NATO AS MECHANISM.

5) HEAD OF USDEL TO GENEVA CONFERENCE, DEPUTY LEGAL
ADVISER ALDRICH, BELIEVES THAT
FRG DEFENSE MINISTRY INTERPRETATIONS REPRESENT AN EFFORT
BY CERTAIN FRG OFFICIALS TO PREVENT ACCEPTANCE OF
PROTOCOLS. THESE INTERPRETATIONS ARE EXTREME, AND IT
WOULD MAKE NO SENSE TO GIVE THEM ANY CURRENCY IF ONE
WERE EXPECTING TO BECOME A PARTY TO THE PROTOCOLS.
SINCE THE WEST CANNOT PREVENT ADOPTION OF PROTOCOLS BY
CONFERENCE, IT IS IN OUR INTEREST TO SEE THEM INTERPRETED
REASONABLY, WHETHER OR NOT WE BECOME PARTIES TO THEM.
THIS IS AN IMPORTANT CONSIDERATION THE FRG SEEMS THUS
FAR UNABLE TO UNDERSTAND, BUT WE MUST KEEP TRYING TO
EXPLAIN IT. END FYI.

6) WE SET FORTH REASONS WHY WE BELIEVED COMMENCEMENT
OF STUDY SHOULD BE DELAYED IN REF C. AS NOTED ABOVE,
THERE HAVE BEEN AND WILL CONTINUE TO BE INTENSIVE
CONSULTATIONS AT DIPLOMATIC CONFERENCE TO ACHIEVE
MAXIMUM POSSIBLE COHERENCE IN POSITIONS OF ALLIES AND IN
LEGAL INTERPRETATION OF ARTICLES. WE FRANKLY DO NOT
BELIEVE THAT NATO IS IN BEST POSITION TO SORT OUT LEGAL
INTERPRETATIONS OF ARTICLES AT PRESENT TIME. AN
ASSESSMENT BY MC OF MILITARY IMPLICATION OF PROVISIONS
IN PROTOCOL COULD BE POTENTIALLY DAMAGING IF BASED ON
ERRONEOUS OR DIVERGENT LEGAL INTERPRETATIONS. MC
STUDY BASED ON FRG STATED INTERPRETATIONS COULD DRAW
CONCLUSIONS REGARDING IMPLICATIONS OF PROTOCOL FOR NATO
STRATEGY THAT WERE UNREALISTIC, AND COULD GO A LONG WAY
IN DERAILING WORK ON PROTOCOL.

7) MC STUDY CAN ONLY REASONABLY BE UNDERTAKEN IF AND
WHEN WORK ON PROTOCOL IS COMPLETED. PROVISIONS MUST
BE CONSIDERED IN RELATION TO OTHER TEXTS IN PROTOCOL.
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THUS, FOR EXAMPLE, IT IS DIFFICULT TO COMMENT ON SEVERAL OF PROVISIONS CONCERNING MEANS AND METHODS OF COMBAT WITHOUT KNOWING OUTCOME ON ART. 42 CONCERNING GUERRILLAS AND HAVING COMPLETE NEGOTIATING RECORD. ONE OF PROBLEMS INHERENT IN FRG INTERPRETATIONS IS TENDENCY TO TAKE ARTICLES OUT OF CONTEXT OF OTHER ARTICLES AND OF NEGOTIATING RECORD. WE STRESS WE ARE CONCERNED ABOUT FRG PROBLEM AND THAT FOR THIS REASON HAVE AGREED TO RAISE ISSUES IN NATO. BUT WE WOULD CONSIDER IT APPROPRIATE TO BEGIN STUDY ONLY WHEN AND IF PROTOCOL IS COMPLETED. IN ADDITION TO OTHER REASONS, A VERY REAL PRACTICAL PROBLEM

IS THAT WE BELIEVE REQUISITE EXPERTISE CANNOT BE MARSHALLED IN ADVANCE OF DIPLOMATIC CONFERENCE TO ENSURE STUDY RECEIVES LEVEL OF SUPPORT WE FEEL ESSENTIAL. (WE BELIEVE THE UK AND CANADA SHARE THIS VIEW.) WE WILL BE ABLE TO WORK ON PROBLEM DURING DIPLOMATIC CONFERENCE AND IMMEDIATELY THEREAFTER.

8) AS A CONCRETE STEP WE COULD AGREE TO BEGIN SIDE CONSULTATIONS AMONG MEMBERS OF "INNER CORE" AT GENEVA DIPLOMATIC CONFERENCE, BEGINNING IN MID-APRIL, WITH VIEW TOWARD DEVELOPING THE MANDATE FOR AN MC STUDY IN AGREEABLE FORM. IF WE WERE SUCCESSFUL, WE WOULD VET RESULTS THROUGH REGULAR CHANNELS. THIS WOULD PROVIDE REAL CHANCE FOR MC STUDY TO BEGIN AT COMPLETION OF DIPLOMATIC CONFERENCE. WE NOTE THAT IF STUDY HAD AS BASIS COMMON INTERPRETATIONS OF PROVISIONS IN PROTOCOL AND SPECIFIC QUESTIONS REGARDING IMPLICATIONS FOR NATO STRATEGY, IT SHOULD BE SIMPLER FOR MC TO UNDERTAKE AND COMPLETE PROMPTLY.

9) IN THIS CONNECTION, USG BELIEVES IT WOULD BE VERY DESIRABLE TO HAVE A COMMON NATO EVALUATION OF PROTOCOLS PRIOR TO THEIR SIGNATURE IF POSSIBLE BUT THIS CLEARLY CANNOT BE DONE UNLESS PRESENT FRG INTERPRETATIONS ARE CONFIDENTIAL

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MODIFIED. IT SHOULD BE MADE CLEAR THAT USG ACCEPTS RECOMMENDATIONS OF BONN MEETING ONLY INsofar AS IT ENVISAGED SEVERAL MONTHS OF STUDY BY NATO FOLLOWING CONCLUSION OF CONFERENCE AND PRIOR TO FINAL DECISION ON PROTOCOL SIGNATURE. (AS INDICATED IN REF (C), WE DO NOT FEEL PROTOCOL WOULD BE READY TO BE OPEN FOR SIGNATURE BEFORE SEPTEMBER.) CLEARLY, USG COULD NOT REPEAT NOT ACCEPT A RIGHT OF VETO BY ONE OR SEVERAL OTHER NATO COUNTRIES ON OUR DECISION WHETHER OR NOT TO SIGN ONE OR BOTH PROTOCOLS. BUT WE RECOGNIZE THAT VIEWS OF ALL ALLIES, PARTICULARLY THOSE IN NATO, WILL BE IMPORTANT FACTOR IN US DECISION. WE WISH NATO TO HAVE REASONABLE

OPPORTUNITY TO DO STUDY AND FOR IT TO BE DISCUSSED
IN ADVANCE OF DECISION. WE BELIEVE USEFULNESS OF SUCH
STUDY WOULD BE TO PERMIT INDIVIDUAL GOVERNMENTS WHICH
MUST MAKE ULTIMATE DECISIONS ON WHETHER OR NOT TO SIGN
PROTOCOL TO ASSESS NEED FOR ANY UNDERSTANDING OR
RESERVATION .

10) WE DO NOT ANTICIPATE SIGNIFICANT PROBLEMS AT NEXT
UNGA. IF WORK IS WRAPPED UP AT FOURTH SESSION OF
DIPLOMATIC CONFERENCE, CONSIDERATION AT UNGA WILL PROB-
ABLY NOT BE BEFORE MID-NOVEMBER BECAUSE OF TIME REQUIRED
TO PREPARE NECESSARY REPORTS. MOVEOVER, IT MAY BE
NOTED THAT THIS ITEM IS TREATED IN SIXTH (LEGAL)
COMMITTEE OF UNGA WHICH FOR LAST SEVERAL YEARS

HAS CONFINED ITSELF TO PROCEDURAL RESOLUTIONS SUPPORTING
WORK OF DIPLOMATIC CONFERENCE. BECAUSE OF TIMING
PROBLEM, IT IS UNLIKELY THAT SIXTH COMMITTEE COULD DEAL
IN ANY SUBSTANTIVE WAY WITH NEW PROTOCOLS AT NEXT UNGA.
A PROCEDURAL RESOLUTION GENERALLY WELCOMING ADOPTION OF
NEW PROTOCOLS AND URGING STATES TO CONSIDER EARLY
RATIFICATION IS NOT LIKELY TO IMPINGE ON NATIONAL
DECISION-MAKING OF NATO ALLIES REGARDING UNDERSTANDINGS
AND/OR RESERVATIONS.
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11) ALTHOUGH WE AGREE THAT PROBLEM OF OBTAINING MC
STUDY SHOULD BE APPROPRIATELY RAISED IN NATO, WE ARE NOT
ANXIOUS TO GET OUT IN FRONT PRESSING FOR STUDY. WE
BELIEVE WE SHOULD SORT OUT PROBLEMS SOMEWHAT MORE
CLEARLY AMONG MEMBERS OF "INNER CORE" BEFORE MAKING
INITIAL PRESENTATION TO OTHER ALLIES. THIS APPEARS TO
US LOGICAL METHOD OF STRUCTURING CONSULTATIONS AND
PREVENTING THAT THEY GET OUT OF HAND. MISSION IS THUS
AUTHORIZED TO PROCEED WITH CONSULTATION WITH OTHER MEM-
BERS OF "INNER CORE" AND TO RAISE SUBJECT IN POLADS,
PROVIDED THERE IS NO SERIOUS OBJECTION FROM INNER CORE
MEMBERS. USDEL SHOULD SEEK AGREEMENT TO DEFER MC STUDY
UNTIL CONCLUSION OF DIPLOMATIC CONFERENCE, BUT SUPPORT
PROMPT STUDY THEREAFTER DESIGNED TO PERMIT EVALUATION
OF SECURITY IMPLICATIONS BEFORE NATO MEMBERS WILL BE
REQUIRED TO DECIDE WHETHER TO SIGN PROTOCOL, IN THESE
CONSULTATIONS AND DISCUSSION. WE HAVE NO STRONG PRE-
FERENCE AS TO WHO RAISES QUESTION IN POLADS. IN PRE-
CONSULTATIONS AND IN POLADS, MISSION IS AUTHORIZED TO
DRAW ON ABOVE AND REF C AS APPROPRIATE. WE WILL REVIEW
SITUATION IN LIGHT OF RESULTS OF CONSULTATIONS AND
POLADS DISCUSSIONS.
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